TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 21

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1952

CERTIORARI GRANTED APRIL 7, 1952

SUPREME COURT OF THE UNITED STATES

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PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

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1a *Appendix to brief for appellant*

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 9793

PHYLLIS BRAUNER AND ELIZABETH PALYA

v.

THE UNITED STATES OF AMERICA

Charles J. Biddle, Esq.
G. A. Gleeson, Esq.

Docket entries

Filed August 28, 1951

No. 10142

Index
No. 1949

1. June 21—Complaint filed.
   June 21—Summons exit.
2. July 5—Appearance of Gerald A. Gleeson, Esq., for defendant filed.
3. July 14—Summons returned "June 30, 1949, and served on Attorney General of the United States by registered mail and on June 22, 1949, served Gerald A. Gleeson, Esq., United States District Attorney, and filed.
4. Aug. 17—Stipulation of counsel extending time within which to file Answer to October 19, 1949, and Order of Court approving same filed. Noted 8/18/49.
5. Oct. 20—Stipulation of counsel extending time for filing Answer to December 18, 1949, and Order of Court approving same filed. 10/21/49 Noted.
6. Nov. 22—Answer filed.
7. Nov. 22—Order to place case on trial list filed.
8. Nov. 28—Plaintiff's interrogatories filed.

2a 9. Dec. 5—Stipulation of counsel extending time for filing answers to plaintiff's interrogatories to December 28, 1949, and Order of Court approving same filed. Noted 12/6/49.

10. Dec. 8—Motion for stipulation of counsel and Order of Court consolidating Civil Action #10142 with this case for trial filed. Noted 12/9/49.

11. Dec. 28—Stipulation of counsel extending time for filing answers to interrogatories to January 17, 1950, and Order of Court approving same, filed. 12/29/49 Noted.

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12. Jan. 5—Defendant's answer to interrogatories filed.
13. Jan. 18—Plaintiff's motion for production of documents, filed.
14. Jan. 18—Order to place case on Argument List, filed.
15. Jan. 25—Motion to quash order and motion for production of documents filed.
16. Feb. 15—Hearing sur plaintiff's motion for production of documents and sur defendant's motion to quash, etc. C. A. V.
17. June 30—Opinion, Kirkpatrick, J., denying defendant's motion to quash and granting plaintiff's motion to produce filed.
18. July 20—Order of Court permitting plaintiff to inspect certain documents, etc., and staying all proceedings until order is complied with or vacated. Noted and Notice mailed 7/21/50.
19. Aug. 30—Transcript of hearing on August 9, 1950, before Kirkpatrick, J. at Washington, D. C., filed.

3a 20. Sept. 21.—Amended Order re production and inspecting of documents, filed.

21. Oct. 10.—Defendant's Petition for rehearing on motion to quash Order and motion for production of documents, filed.
22. Oct. 10.—Claim of privilege by Secretary of the Air Force, filed.
23. Oct. 10.—Affidavit of Judge Advocate General, U. S. Air Force, filed.

Oct. 12.—Order of Court that facts be taken as established, filed. 10/13/50. Noted and Notice Mailed (#10142).

Nov. 27.—Trial (Kirkpatrick, J.) Witnesses sworn. C. A. V.

24. Dec. 11.—Transcript of testimony, filed.
25. Dec. 18.—Plaintiff's Requests for findings of fact, filed.
26. Dec. 18.—Plaintiff's Requests for conclusions of law, filed.

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27. Feb. 20.—Opinion, Kirkpatrick, J., granting judgment for plaintiff's requests for Findings of Fact and Conclusions of Law, filed.
28. Feb. 27.—Decree granting judgment in favor of plaintiffs in the sum of $80,000, each filed. Noted and Notice mailed 2/28/51.

Mar. 2.—Transcript of hearing of November 21, 1951 (In Chambers, K., J.), filed. (See #10142.)
29. Apr. 20.—Notice of appeal of defendant filed. (4/23/51 Copies to Chas. J. Biddle.)
30. Apr. 20.—Copy of Clerk's notice to U. S. Court of Appeals filed.

4a In United States District Court

PATRICIA J. REYNOLDS

v.

THE UNITED STATES OF AMERICA

Charles J. Biddle, Esq.
G. A. Gleeson, Esq.

Docket entries and index

Index No. 1949

1. Sept. 27.—Complaint filed.
Sept. 27.—Summons exit.
2. Nov. 9.—Summons returned "on September 28, 1949, served on Gerald A. Gleeson, Esq., and on October 10, 1949, served on the Attorney General by registered mail and filed.
3. Nov. 22.—Answer filed.
4. Nov. 22.—Order to place case on trial list, filed.
Dec. 8.—Motion for stipulation of counsel and Order of Court consolidating this case with civil action #9793 for trial filed (#9793). Noted 12/9/49.

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June 30.—Opinion, Kirkpatrick, J., denying defendant's motion to quash and granting plaintiff's motion to produce filed (#9793).
July 20.—Order of Court permitting plaintiff to inspect certain documents etc., and staying all other proceedings until order is complied with or vacated filed (#9793). Noted 7/21/50.
5a Aug. 30.—Transcript of hearing on August 9, 1950, before Kirkpatrick J. at Washington, D. C., filed. (See C. A. #9793.)
Sept. 21.—Amended order re inspection of documents, filed. (See C. A. #9793.)
5. Oct. 10.—Petition for rehearing on motion to quash order and motion for production of documents, filed.

6. Oct. 10.—Claim of Privilege by Secretary of Air Force, filed.
7. Oct. 10.—Affidavit of Judge Advocate General, U. S. Air Force, filed.
8. Oct. 12.—Order of Court that certain facts be taken as established, filed. 10/13/50 Noted and notice mailed.
Nov. 27.—Trial (Kirkpatrick, J.) Witnesses sworn. C. A. V.
Dec. 11.—Trianscript of testimony, filed (#9793).
9. Dec. 18.—Plaintiff's Requests for findings of fact, filed.
10. Dec. 18.—Plaintiff's requests for conclusions of law, filed.

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11. Feb. 20.—Opinion, Kirkpatrick, J., finding in favor of plaintiff, affirming certain plaintiff's requests for findings of fact and conclusions of law, filed.
12. Feb. 27.—Decree granting judgment in favor of plaintiff in the sum of $65,000,000.00 filed. Noted and Notice mailed 2/28/51.
13. Mar. 2.—Transcript of hearing of November 24, 1950 (In chambers K. J.) filed.
14. Apr. 20.—Notice of Appeal of defendant filed. (4/23/51 Copy to Chas J. Biddle.)
15. Apr. 20.—Copy of Clerk's notice to U. S. Court of Appeals, filed.

6a

In United States District Court

Civil Action No. 9793

Complaint

Filed June 21, 1949

Plaintiff Phyllis Brauner is a citizen of the United States residing at 10 Ridley Avenue, Aldan, Delaware County, Pennsylvania, in the Eastern District of Pennsylvania. Plaintiff Elizabeth Palya is a citizen of the United States residing at 16 Station Avenue, Haddon Heights, New Jersey. Plaintiffs bring suit against the United States of America and invoke the jurisdiction of this Court under Section 1346 (b) of Title 28, United States Code, upon the following causes of action:

FIRST CAUSE OF ACTION

1. The defendant herein is the United States of America. On or about October 6, 1948, defendant was the owner, operator and possessor of a certain B-29 airplane.

2. On and prior to said date, and at all times material hereto, the maintenance, supervision, control and operation of the said airplane was carried on by the officers and employees of defendant, while acting within the scope of their office and employment.

3. On and prior to said date, and at all times material hereto, William H. Brauner was a civilian research and development engineer employed by the Franklin Institute, Philadelphia, Pennsylvania.

4. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and employees, the said William H. Brauner boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane.

5. On said date, and while being operated by defendant's officer and employees, the said airplane took off from Macon, Georgia; shortly thereafter developed engine trouble; caught on fire; and crashed in the vicinity of Waycross, Georgia.

7a 6. The said William H. Brauner, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident.

7. The said accident and the death of the said William H. Brauner were caused solely and exclusively by the negligent and wrongful acts and omissions of the officers and employees of the defendant while acting within the scope of their office and employment, and were due in no manner whatsoever to any act or failure to act on the part of the said William H. Brauner.

8. The said William H. Brauner did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency.

9. The said William H. Brauner left surviving him the following persons: his wife, Phyllis Brauner, who is a plaintiff herein; a daughter Susan, aged four; and an after-born daughter Catherine, born February 12, 1949.

10. The Georgia Code, more particularly Title 105, Section 1301 et seq. therefore, provides that under such circumstances the defendant shall be liable to plaintiff for damages in an amount representing the full value of the life of the said William H. Brauner, which amount is hereby claimed.

Wherefore, plaintiff Phyllis Brauner claims of defendant the sum of Three hundred thousand Dollars ($300,000), or such larger amount to which this Honorable Court may determine she is legally entitled.

SECOND CAUSE OF ACTION

11. The allegations of paragraphs 1 and 2 are repeated.

12. On and prior to said date, and at all times material hereto, Albert Palya was a civilian research and development engineer employed by Radio Corporation of America, Camden, New Jersey.

13. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and em-
8a ployees, the said Albert Palya boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane.

14. The allegations of paragraph 5 are repeated.

15. The said Albert Palya, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident.

16. The said accident and the death of the said Albert Palya were caused solely and exclusively by the negligent and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment, and were due in no manner whatsoever to any act or failure to act on the part of the said Albert Palya.

17. The said Albert Palya did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency.

18. The said Albert Palya left surviving him the following persons: his wife, Elizabeth A. Palya, who is a plaintiff herein; a son Robert, aged nine; a son William, aged six; and a daughter Judith, seven weeks old.

19. The Georgia Code, more particularly Title 105, Section 1301 et seq. thereof provides that under such circumstances the defendant shall be liable to plaintiff for damages in an amount representing the full value of the life of the said Albert Palya which amount is hereby claimed.

Wherefore, plaintiff Elizabeth Palya claims of defendant the sum of Three hundred thousand Dollars ($300,000), or such larger amount to which this Honorable Court may determine she is legally entitled.

Hence this suit.

Respectfully submitted.

CHARLES J. BIDDLE,
117 South Seventeenth Street,
Philadelphia 3, Pa., Attorney for Plaintiffs.

9a

In United States District Court

Civil Action No. 9793

Answer

Filed November 22, 1949

An Now comes The United States of America, defendant herein, by its attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and makes answer to the complaint filed herein as follows:

FIRST CAUSE OF ACTION

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Denied. Defendant avers that there was no negligent and wrongful acts and omissions on the part of any officers or employees of the defendant. The defendant was in no manner responsible for the accident.
8. Admitted.
9. Admitted.
10. Proof demanded.

Wherefore, defendant prays that the action be dismissed.

SECOND CAUSE OF ACTION

11. Admitted.
12. Admitted.
13. Admitted.
14. Admitted.
15. Admitted.
16. Denied. Defendant avers that there were no negligent and wrongful acts and omissions on the part of any officers or employees of the defendant. The defendant was in no manner responsible for the accident.
17. Admitted.
18. Admitted.
19. Proof demanded.

10a

Wherefore, defendant prays that the action be dismissed.

(S) GERALD A. GLEESON,
United States Attorney.

(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Civil Action No. 9793

Interrogatories propounded by plaintiffs for answer under Rule 33

Filed November 28, 1949

Phyllis Brauner and Elizabeth Palya, plaintiffs in the above action, by their attorney, Charles J. Biddle, Esquire, hereby make demand that defendant or its counsel answer the following interrogatories and submit copies of the records and documents requested, under or pursuant to Rule 33:

1. With reference to the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948:

(a) Was an investigation (or investigations) into said crash made or directed to be made by defendant, its officers, employees, servants or appointees?

(b) If so, attach to your answer a copy of the reports and findings of such investigation (or investigations, if more than one).

2. With reference to the said B–29 type aircraft:

(a) Did defendant require that current aircraft maintenance records (formerly referred to as USAF Forms 1 and 1A be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

3. With reference to the said B–29 type aircraft:

(a) Did defendant require that current flight engineering records (formerly referred to as USAF Forms 41B) be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

4. With reference to the said B–29 type aircraft:

11a (a) Did defendant require that any other records or logs showing mechanical condition, maintenance of equipment, require and/or flight records of said aircraft be maintained?

(b) If so, attach complete copies of said records or logs to your answer, covering the entire history of the aircraft.

5. Has defendant obtained a statement or statements, either oral or written:

(a) Concerning the events leading up to the crash of said B–29 type aircraft?

(b) Concerning the mechanical condition of said aircraft immediately prior to the crash?

(c) Concerning the cause or probable cause (or causes) of said crash and the resultant loss of lives?

(d) Otherwise concerning the said crash in any way?

6. If the answer to any part of interrogatory number 5 is in the affirmative, attach to your answer a copy of each such statement (or in the case of an oral statement, a write-up of the same), and state:

(a) Name or names and present addresses of the person or persons from whom each of such statements was obtained.

(b) The name of the person taking each such statement, and the date taken.

7. Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1948, prior to the crash?

8. If your answer to the preceding interrogatory is in the affirmative:

(a) At what altitude and at what time was such trouble first experienced?

(b) Describe in detail the trouble experienced.

9. (a) Did said aircraft, or any of its engines, catch on fire prior to the crash? If so, at what altitude, and at what time?

(b) If more than one fire occurred, give details, including altitude and time at which each fire started.

12a 10. What orders, if any, were issued to the civilian personnel in the said aircraft to adjust their parachutes and prepare to bail out? At what altitudes and at what times?

11. Was the order ever given to the civilian personnel to bail out of said aircraft: If so:

(a) At what altitude, at what time, and how was it given?

(b) Was the aircraft in normal flight at the time? If not, describe any abnormality.

12. Was the said aircraft equipped with an automatic pilot? If so:

(a) Was it functioning properly on October 6, 1948?

(b) When was this equipment first turned on?

(c) Was it operating at the time the order to bail out was given? If not, why not?

13. At what time did the said aircraft crash? At what altitude above sea level?

14. Was the said aircraft equipped with fire fighting equipment? If so:

(a) Was the said fire fighting equipment standard for said type of aircraft? If not, describe any difference.

(b) Did said equipment, if any, include equipment for smothering engine fires?

15. If your answer to the first part of interrogatory number 14 is in the affirmative:

(a) How recently before the crash had said equipment been tested?

(b) Was said equipment functioning properly immediately prior to the crash?

(c) Was said crash due in any way to a failure on the part of said equipment to function properly?

(d) If you have any report or reports as to failure of the fire fighting equipment of said aircraft, either at this time or previously, attach copies of the same?

16. On what date was said aircraft first placed in an operational status?

17. How many hours in flight had been logged on said aircraft (prior to the crash)?

13a 18. Had said aircraft been involved in any accident or accidents prior to October 6, 1948? If so, give details, and attach copies of official reports of investigation.

19. Did defendant have in force on October 6, 1948, any written standard regulations with reference to the operation of army aircraft, and the carrying of civilian personnel therein (sometimes referred to as Airforce Regulations)? If so, attach a complete copy of all such regulations.

20. (a) What was the name of the pilot of the said B–29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

21. (a) What was the name of the copilot of the said B–29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

22. (a) Was the said B–29 type aircraft fitted with emergency escape hatches?

(b) If so, give the size and location of each escape hatch.

(c) How many doors must be opened to escape from each escape hatch?

23. (a) What was the weight of the said B–29 type aicraft empty?

(b) What was its gross weight loaded, on October 6, 1948?

(c) What is the maximum gross weight allowable for such type of aircraft under normal conditions?

(d) Was there anything unusual about the distribution of weight or personnel in said aircraft, on October 6, 1948?

24. Do the engines in this type of aircraft tend to overheat when run at full power? If so:

14a (a) For what periods and at what times were the engines of this aircraft run at full power on October 6, 1948?

(b) Did the engines of this aircraft give any evidence of overheating on October 6, 1948? If so, give details, including time and temperatures.

25. (a) Was a radio log kept on said aircraft showing communications with other aircraft and with ground stations?

(b) If so, attach a copy of said radio log for October 6, 1948, to your answer.

26. (a) Was a radio log kept at the field at Macon of messages sent to and received from said aircraft on October 6, 1948?

(b) If so, attach to your answer a copy of such radio log.

27. (a) Did the pilot of said aircraft bail out of the aircraft with his parachute?

(b) If so, at what altitude above the ground?

28. (a) Did the copilot of said aircraft bail out of the aircraft with his parachute?

(b) If so, at what altitude above the ground.

29. Were any pictures taken of the wreckage by defendant after the crash? If so, attach copies.

30. During the three months immediately preceding the crash on October 6, 1948, was it necessary at any time to postpone a scheduled flight of the said B–29 type aircraft because of mechanical or engineering defects? If so, list the date or dates of such postponements, giving the defects causing each such postponement and the steps taken to remedy them.

31. (a) Have any modifications been prescribed by defendant for the engines in its B–29 type aircraft to prevent overheating of the engines and/or to reduce the fire hazard in the engines?

(b) If so, when were such modifications prescribed?

15a (c) If so, had any such modifications been carried out on the engines of the particular B–29 type aircraft involved in the instant case? Give details.

(S) CHAS. J. BIDDLE,
Counsel for Plaintiffs.

In United States District Court

Civil Action No. 9793

Answer to interrogatories propounded by plaintiffs for answer under Rule 33

Filed January 5, 1950

Comes Now the United States of America by its attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant

United States Attorney in and for said District, and makes answer to the Interrogatories propounded by plaintiffs herein, as follows:

1. (a) Yes.

(b) This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Civil Procedure, as amended.

16a 2. (a) Yes.

(b) Destroyed in crash.

3. Yes, see attached Exhibit "A."

4. Yes, see attached Exhibit "A."

5. (a) Yes.

(b) Yes.

(c) Yes.

(d) Yes.

6. This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Procedure, as amended.

(a) Captain Herbert W. Moore, 1275A, Tyndall Air Force Base, Fla., S/Sgt. Walter J. Peny, AF 693025, Chatham Air Force Base, Fla., T/Sgt. Earl W. Murrhee, AF 14171471, MacDill Field, Fla., Eugene Mechlir, 52 Wesley Ave., Erlton, N. Y.

(b) Not applicable.

7. Yes, almost immediately before the crash.

8. (a) 18,500 feet altitude at approximately 1400 hours, e. s. t.

(b) At between 18,500 or 19,000 feet manfold pressure dropped to 23" on No. 1 engine.

(c) Thereafter engine No. 1 was feathered. Fire broke out which was extinguished.

9. (a) Yes, No. 1 engine of the aircraft caught fire at approximately 20,000 feet and approximately 1,405 hours eastern time.

(b) One fire occurred.

10. All personnel were instructed by the pilot to put their chutes on immediately after leveling off at 20,000 feet, and prior to the outbreak of the engine fire.

11. (a) (b) At the instant the gear was extended, and the bomb bay doors opened to facilitate parachuting from the aircraft, the aircraft fell into a violent spin, the centrifugal force probably made it difficult to bail out. Testimony does not indicate whether or not order was given.

17a 12. Yes.

(a) Yes.

(b) On the climb that day.

(c) The auto-pilot was not being used at the time of the accident. The pilot turned it off. The erratic action of the aircraft after the gear was extended and the bomb bay doors opened wo[illegible]

have precluded using the auto pilot to hold the aircraft while bailing out.

13. Aircraft crashed at approximately 1408 hours Eastern time at point about 500 feet above sea level.

14. Yes.

(a) Yes.

(b) Yes, it was equipped with carbon dioxide fire extinguisher system for smothering engine fire.

15. (a) On June 1948.

(b) Yes.

(c) No.

(d) Not applicable in view of 15 (a) (b) (c).

16. Aircraft was placed on operational status on 19 October 1945.

17. Said aircraft was logged 304 hours and ten minutes prior to the accident.

18. Said aircraft had never been involved in an accident prior to October 6, 1948.

19. Yes. See attached Exhibit "B."

20. (a) Pilot of said B-29 on October 6, 1948, was Captain Ralph W. Erwin.

(b) Yes.

(c) See Exhibit "C" attached.

21. (a) Name of the copilot of said B-29 on October 6, 1948, was Captain Herbert W. Moore, Jr.

(b) Yes.

(c) Form 5 is attached, marked Exhibit "D."

22. (a) Yes.

(b) See attached Exhibit "E."

(c) Two doors must be opened to get from the rear pressurized compartments, one door must be opened to get from front compartment.

18a 23. (a) Weight of said B-29 empty 69, 121.

(b) Gross weight, approximately but not exceeding 109,000 pounds on October 6, 1948.

(c) Under normal conditions gross weight allowable is 102,000 pounds.

(d) There was nothing unusual about the distribution of weight or personnel in said aircraft on 6 October 1948.

24. The engines of all aircraft tend to overheat including the B-29's, when run at full power.

(a) The engines of this aircraft were never run at full power on October 6, 1948. Only the prescribed take-off, climb and cruise power settings were used which never approached full power.

(b) The engine head temperatures on engine Nos. 1, 2 and 4 were high after take-off and manifold pressure was reduced to 40"

hg. The airspeed was kept at 195 and no further high head temperature was experienced. This engine reaction is not unusual for B–29 type of aircraft on climbs after a take-off.

25. (a) If one was kept it was destroyed in the aircraft crash.

(b) Answer as in 25 (a).

26. (a) A radio log was kept by the control tower at Robins Air Force Base of messages sent to and received by the said TB–29 for take-off instruction but the military airways logs are destroyed after one year and if there were any en route messages to any airways station from said aircraft they are no longer available.

(b) Copy of Air Base tower Radio log is attached. See Exhibit "F."

27. (a) Pilot did not appear to have bailed out. Body was found near wreckage, with no parachute attached.

(b) Not applicable, see 27 (a) above.

28. (a) Yes.

(b) Copilot of said aircraft bailed out at approximately 15,000 feet.

29. Yes, see attached Exhibit "G."

19a 30. No. Scheduled flight was postponed for mechanical and engineering defects for three months prior to October 6, 1948.

31. No.

(S) GERALD A. GLEESON,
United States Attorney.

(S) THOMAS J. CURTIN,
Assistant United States Attorney,
Attorneys for Defendant.

[*Duly sworn to by Thomas J. Curtin; jurat omitted in printing.*]

In United States District Court

Motion for production of documents under Rule 34

Filed January 18, 1950

Plaintiffs, Phyllis Brauner and Elizabeth Palya, by their attorney, Charles J. Biddle, Esquire, move the court for an order to compel defendant herein, United States of America, to produce and to permit plaintiffs to inspect and to copy each of the following documents:

(a) The report and findings of the official investigation of the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948.

(b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A.

(c) The statement with reference to such crash of Staff Sergeant Walter J. Peny, AF698025.

(d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF14171471.

Defendant, the United States of America, has the posses-
20a sion, custody and control of each of the foregoing documents, and has refused to provide copies of same although requested to do so pursuant to interrogatories propounded by plaintiffs for answer under Rule 33. Each of said documents constitutes or contains evidence or information relevant and material to the action and necessary to the plaintiffs in preparation for trial of this action, as more fully shown in Exhibit A hereto attached.

(S) CHARLES J. BIDDLE,
117 South Seventeenth Street, Philadelphia 3, Pennsylvania, Attorney for Plaintiffs.

STATE OF ----------,
County of ----------, ss:

Elizabeth Palya, being first duly sworn, deposes and says:

1. That she is one of the plaintiffs herein.

2. That this action is brought to recover damages for the death of William H. Bräuner and Albert Palya, being respectively the husbands of the two plaintiffs herein and who lost their lives in the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948.

3. That this action was commenced by filing complaint and service of summons on or about the twenty-first day of June 1949; that the defendant duly appeared and issue was joined by the service on the twenty-second day of November 1949, of defendant's answer.

4. That counsel for plaintiffs has endeavored to obtain copies of the said documents pursuant to interrogatories propounded under Rule 33, but that defendant has refused to provide copies of the same, stating that such material is not within the scope of interrogatories filed pursuant to Rule 33.

5. That none of the said documents are in the possession or under the control of deponent and she is wholly ignorant of their
precise contents; that each and every one of the aforesaid
21a documents are in the possession and under the control of the defendant; that a knowledge of the contents thereof is essential to a preparation of plaintiffs' case for trial; and that deponent knows of no way to obtain a knowledge of the contents of said documents or the cause of said accident except by obtaining an order compelling the defendant to make discovery thereof,

due to the fact that the said B–29 type aircraft was within the exclusive possession and control of defendant.

EXHIBIT A

6. That deponent has fully and fairly stated the case in this action to her counsel, Charles J. Biddle, Esquire, and that she has a good and meritorious cause of action herein and that all of said documents are material and necessary to the plaintiff to enable her counsel to prepare for trial and that she cannot safely proceed to trial without them as she is advised by her said counsel after such statement and verily believes.

7. That this application is made in good faith for the purpose stated and no other and that deponent intends to use each and every one of the aforesaid documents in preparation for or upon the trial.

Wherefore, your deponent respectfully applies to the court for an order requiring the defendant herein to produce and discover, or to give an inspection and copy of, or permission to take a copy of each and every one of the aforesaid documents, and to deposit each and every one of said documents in the office of the clerk of the court, or elsewhere as the court shall direct, where they shall remain subject to the examination of this deponent's attorney during the ordinary business hours for such a period as the court shall direct, and to permit deponent to take photostatic copies of any such documents as she shall require.

Sworn to and subscribed before me this 13th day of January 1950.

(S) ELIZABETH A. PALYA. [SEAL]
(S) WM. B. MANLOVE,
Notary Public.

My commission expires September 8, 1954.

In United States District Court

Motion to quash order and motion for production of documents under Rule 34

Filed January 25, 1950

22a Now comes the United States of America by its Attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and moves to quash the Order and Motion for Production of Documents under Rule 34 for the following reasons:

1. Report and findings of official investigation of air crash near Waycross, Georgia, are privileged documents, part of the executive files and declared confidential, pursuant to regulation promulgated under authority of Revised Statute 161 (5 U. S. Code 22).

2. Report and findings of the official investigation of air crash near Waycross, Georgia, are hearsay.

3. The statement made by Captain Herbert W. Moore is hearsay and if the same is desired plaintiffs could take his deposition.

4. The statement made by Staff Sergeant Walter J. Peny is hearsay, and if the same is desired plaintiffs could take his deposition.

5. The statement made by Technical Sergeant Earl W. Murrhee is hearsay, and if the same is desired plaintiffs could take his deposition.

Wherefore, it is respectfully that the Order be denied, and the Motion dismissed.

(S) GERALD A. GLEESON,
United States Attorney.
(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Opinion on motion for production of documents under Rule 34

Filed June 30, 1950

Before KIRKPATRICK, Ch. J.

These two actions, consolidated for trial, were brought under the Federal Tort Claims Act to recover damages for the deaths of the plaintiffs' husbands, civilian passengers in an Army B-29 which crashed at Waycross, Georgia, on October 6, 1948. The plaintiffs have moved, under Rule 34, for an order requir-
23a ing the production by the defendant of written statements of three witnesses, soldiers who were in the plane and escaped death by bailing out, and also the report and findings of the official investigation made by the defendant. The defendant opposes the granting of the motion on the grounds (1) as to all the documents, that the plaintiffs have not shown good cause for their production, (2) as to the report and findings of the investigation, that they are privileged. While the exact date does not appear, it is conceded that the statements were taken and the investigation conducted within a very short time after the accident. These suits were begun on June 21, 1949.

It is clear from the carefully worded order amending the opinion of the Court of Appeals in Alltmont vs. United States, 177

F. 2d 971, that the Court wanted to make sure that what was said in the original opinion would not be seized upon as support for the proposition that if a party seeking discovery gets the name and address of a witness he cannot, under any circumstances, get a statement which the witness has given. And the Court also carefully avoided ruling that even when the witnesses are accessible and can be examined without undue hardship and delay their statements are necessarily immune. The Court merely said that in such a case "it is quite possible" that the party seeking production of the statements may not be able to show good cause. The Alltmont case, supra, decided that copies of such statements cannot be obtained without a showing of good cause, by means of procedure under Rule 33. Where, as here, the motion is under Rule 34, the production of a statement may still be obtained provided good cause is shown. Whether, in the present case, good cause appears is, therefore, properly before this Court.

Preliminarily, it may be said that this is not the case of statements obtained by an attorney or of statements obtained by others under the attorney's direction or for the purpose of aiding the attorney in preparing for trial. Hickman vs. Taylor, 329 U. S. 495, dealt with statements secured directly by the attorney himself and the gist of the decision was that considerations of policy arising from the function of the lawyer in the adversary
24a procedure by which our courts administer justice require that in such case the party seeking discovery must show circumstances of an exceptional nature in order to establish good cause. In the Alltmont case, supra, the opinion of the Court of Appeals extends the doctrine of Hickman v. Taylor to cover statements obtained by others for the attorney in connection with his preparation for trial. As stated, the statements asked for in the present case fall into neither category.

Concededly, in determining what amounts to good cause under Rule 34, the trial court has a wide discretion. Every case presents its own particular problems and any attempt to establish rigid rules would seriously impair the flexibility and efficiency of the federal discovery procedure. With this in mind, the facts bearing on this motion as they appear from the record and from the statements of counsel at the argument will be examined.

The plaintiffs reside within a few miles of Philadelphia. The three witnesses whose names have been supplied are Army Air Force personnel stationed at three different Army air bases in Florida. The burden, expense and inconvenience to the plaintiffs involved in taking their depositions are factors for the Court to consider in exercising its discretion, though of themselves they do not necessarily establish good cause. It was suggested at the argument that the defendant might bring the witnesses to Philadelphia

or even pay the expenses of the Plaintiffs' attorney to Florida but I do not understand that any binding commitment to that effect has been made nor have I the power to order it under this motion to produce. I have received no intimation that the suggestion made by the government attorney would be approved or carried into effect by the Army Command.

However, assuming that it is possible to take the depositions of the witnesses in question without undue burden upon the plaintiffs, the fact remains that, in view of the nature of this particular case, disclosures of the contents of their written statements is necessary to enable the plaintiffs to properly prepare their cases for trial, and furnishes good cause for production.

25a The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information, and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

I am not suggesting that the witnesses on deposition would not answer the question asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise first-hand information as to every relevant fact if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the

interrogatory "Describe in detail the trouble experienced", the answer is, "At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. 1 engine." Obviously, the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

26a

Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun.

For these reasons I conclude that good cause appears for the production of all documents which are subject to the motion.

The immunity which the Government asserts for the report and findings of the official investigation, so far as it is based upon the express provision of the Statute (R. S. 161, 5 U. S. C. A. 22) and the rules and regulations of the Department of Justice, has been fully considered and held not sustainable by this Court in O'Neill vs. United States (the Alltmont case), 79 F. Supp. 827. Much of what was said in that case on the point is pertinent here and need not be repeated. And while the decision was reversed upon other grounds, the question of privilege was not dealt with by the Court of Appeals. The action in the Alltmont case, supra, was under the Suits in Admiralty Act but the provision of the Tort Claims Act, under which this action is brought, to the effect that the United States shall be liable "in the same manner" as a private individual, is the equivalent of "according to . . . the rules of practice obtaining in like cases between private parties" in the Suits in Admiralty Act. Wunderly v. United States, 8 F. R. D. 356.

Again, as in the Alltmont case, supra, the Government does not here contend that this is a case involving the well recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security.

27a

In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged, in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper

discipline. I can find no recognition in the law of the existence of such a privilege. Substantially, this same claim has been considered and rejected in at least two District Court cases, Bank Line Limited v. United States, 68 F. Supp. 587, 76 F. Supp. 801, and Cresmer v. United States, 9 F. R. D. 203. The first of these cases was under the Suits in Admiralty Act and the second under the Tort Claims Act, but the privilege claimed was the same in both. I agree with the results of these decisions and conclude that the report and findings in this case are not privileged.

The defendant's motion to quash is denied and the plaintiffs' motion to produce is granted.

In United States District Court

Petition for rehearing on motion to quash order and motion for production of documents under Rule 34

Filed October 10, 1950

Now comes the United States of America by its Attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and requests the court for rehearing on the above-entitled matter, for the following reasons:

1. That the order, entered pursuant to the opinion in this case, is contrary to law.

2. That the order, entered pursuant to the opinion in this case, is in violation of revised statute 161 (5 U. S. Code 22).

3. The plaintiffs have failed to show good cause sufficient to compel production of the documents sought under Rule 34 of the Federal Rules of Civil Procedure.

28a Wherefore, it is respectfully requested that the petition for rehearing be approved.

(S) GERALD A. GLEESON,
United States Attorney.
(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Claim of privilege by the Secretary of the Air Force

(Filed October 10, 1950

The plaintiffs have filed suits against the United States for the wrongful deaths of their husbands, who were killed in a mili-

tary aircraft while on a highly secret military mission, near Waycross, Georgia, on 6 October 1948. Counsel for the plaintiffs have applied to this court pursuant to Rule 34 of the Federal Rules of Civil Procedure for copies of the findings of the Board of Officers appointed to investigate the accident pursuant to Air Force Regulation No. 62–14 and statements of Air Force personnel witnesses.

With respect to the production of statements of witnesses interrogated by the Board sought by the plaintiffs' counsel, there has been no affidavit showing good cause; nor any showing of necessity for the production of this information. The defendant in fact has provided the plaintiffs with the names and known addresses of its witnesses. The names and addresses were furnished in answer to the plaintiffs' interrogatories.

With regard to the demand for the production of the Report of Investigation (Report of Major Aircraft Accident, AF Form 14) and any other ancillary report or statement pertaining to this investigation, the respondent-defendant, the United States, has objected and still objects to the production of this report on the grounds that it is privileged. The report of investigation (Report of Major Aircraft Accident, AF Form 14), together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the high-
29a est degree of flying safety. These reports are prepared for interdepartmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate such accidents. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety.

The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest. The furnishing of such information to claimants or litigants against the Government is

not contemplated under the provisions of Air Force Regulation No. 62–14, and if such information is to be released it must be released as prescribed in Air Force Regulation No. 112–2, paragraph 6; Air Force Regulation No. 112–2, paragraph 20; Army Regulation No. 410–5; and Army Regulation No. 420–5, 32 CFR 836.7 (by Joint Army-Air Force Regulation No. 1–1–60, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations).

The issue presented is solely whether reports of Boards of Investigation and statements of witnesses which are concerned with secret and confidential missions and equipment of the Air Force, declared confidential and privileged by law and Department regulations, and which are the work-product of the Department of the Air Force, are privileged and their production is beyond judicial authority in this litigation.

It has been the historic position of the executive branch of the Government that executive files and investigative reports are confidential and privileged and that their disclosure would not
30a be in the public interest. President Washington in 1796 refused to furnish the instructions to the U. S. Minister concerning the Jay Treaty.

President Jefferson in 1807 refused to furnish confidential letters relative to the Burr conspiracy.

President Monroe in 1825 refused to furnish document relating to the conduct of naval officers in the Pacific.

President Jackson in 1833 refused to furnish a paper read by him to the heads of departments relating to the removal of bank deposits.

President Tyler in 1842 refused to furnish the names of the Congressmen who applied for office, and in 1843 refused to furnish a War Department report on alleged Indian frauds.

President Polk in 1846 refused to furnish evidence of payments made by the State Department on President's certificates.

President Fillmore in 1852 refused to furnish information on a proposal by the King of the Sandwich Islands to transfer the islands to the United States.

President Lincoln in 1861 refused to furnish Major Anderson's dispatches relative to the defense of Fort Sumter.

President Grant in 1876 refused to furnish information concerning executive acts performed away from the Capitol.

President Hayes in 1877 refused to permit the Secretary of the Treasury to produce papers concerning the nomination of Theodore Roosevelt as Collector of the Port of New York.

President Cleveland in 1886 refused to produce documents relating to suspension and removal of Federal Officials.

President Theodore Roosevelt in 1909 refused to produce documents of the Bureau of Corporations.

President Coolidge in 1924 refused to produce a list of companies in which Secretary of the Treasury Mellon was interested.

President Hoover in 1930 refused to produce the letters leading up to the London Naval Treaty; and in 1932 refused to produce documents concerning a Treasury Department investigation.

31a President Franklin D. Roosevelt in 1941 refused to permit the Director, F. B. I., to produce F. B. I. reports; in 1943 he refused to permit the Director, Bureau of the Budget, to produce the files and correspondence of that Bureau relative to the transfer of the F. C. C.'s functions; also refused to permit the Chairman of the Board of War Communications and the Secretary of War to produce their files in the matter; and in 1944 refused to permit the Director, F. B. I., to produce reports of that agency.

President Truman in 1947 refused to permit the Civil Service Commission to produce records concerning applicants for positions; and in 1948 refused to permit disclosure of F. B. I. reports used in the Employees Loyalty Investigation.

The position of the executive branch of the Government and of this Department is restated in the opinion of the Attorney General Jackson of April 30, 1941, 40 Op. Atty. Gen. No. 8. That opinion pointed to the following injurious results: (1) disclosure would seriously prejudice law enforcement; (2) disclosure would prejudice the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation for keeping of faith with confidential informants is an indispensable condition of future efficiency; and (4) disclosure might also result in the grossest kind of injustice to innocent individuals because the reports include leads and suspicions and sometimes even the statements of malicious or misinformed people.

This position is historically approved and authorized by authority of R. S. 161, 5 U. S. C. 22, and Air Force Regulations issued pursuant thereto, including Air Force Regulations Nos. 205–1, 112–2, 62–14, and Army Regulations Nos. 410–5 and 420–5 (by Joint Army-Air Force Regulation No. 1–11–60, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations). It may therefore be seen, the position taken by the Air Force in respect to the production of the documents in question has been

affirmed time and time again by the courts: Boske v. Comingore, 177 U. S. 459 (1900); Ex parte Sackett, 74 F. (2d) 922
32a (C. C. A. 9th, 1935); United States v. Potts, 57 F. Supp. 204 (M. D. Pa., 1944); U. S. ex rel. Bayarsky v. Brooks, 51 F. Supp. 974 (D. N. J., 1943); Harwood v. McMurtry, 22 F. Supp. 572 (W. D. Ky., 1938); Federal Life Ins. Co. v. Tolod, 30 F. Supp. 713 (M. D. Pa., 1940); Walling as W. & H. Adm. v. Comet Carriers, 3 F. R. D. 442 (S. D. N. Y., 1944); Young v. Terminal Ry., 70 F. Supp. 106 (E. D. Mo., 1947); see In re Lamberton, 124 F. 446 (W. D. Ark., 1903); Stegall v. Thurman, 175 F. 813 (N. D. Ga., 1910); Brent v. Hagner, 5 Cranch C. C. 71, Fed. Cas. No. 1,839 (C. C. D. C., 1836); (1853) 6 Op. Atty. Gen. 7; (1877) 15 Op. Atty. Gen. 342; (1905) 25 Op. Atty. Gen. 326; (1941) 40 Op. Atty. Gen. No. 8.

For the reasons stated above, I consider that the compulsory production of the Reports of Investigation conducted by the Board of Officers convened under the provisions of Air Force Regulation No. 62–14 and other pertinent regulations in connection with aircraft accidents is prejudicial to the efficient operation of the Department of the Air Force, is not in the public interest, and is inconsistent with national security. Accordingly, pursuant to the authority vested in me as head of the Department of the Air Force, I assert the privileged status of reports here involved and must respectfully decline to permit their production.

(S) THOMAS K. FINLETTER,
Secretary of the Air Force.

In United States District Court

Affidavit of the Secretary of the Air Force

The Secretary of the Air Force is the head of the Department of the Air Force, Public Law 216, Chap. 412, 81st Congress, 1st Session, Section 5 (4), reads in part:

"The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense."

The meaning of the words "separately administered" is best exemplified by the following remark made by the Honorable
33a Carl Vinson, Chairman of the House Committee on Armed Services, during the full committee hearing on S. 1843, on June 28, 1949:

"Well, they are separately administered under the direction, authority, and control of the Secretary of National Defense. They are not all administered from the Secretary's office. The laws today confer certain rights on the various secretaries. They are to

carry out all those laws under the direction, authority, and control of the Secretary. Otherwise the Secretary would sit up in his office and try to run the whole establishment, and he couldn't do that because it is too large. So he has to let these Secretaries run their Departments separately from each other and separately from him, except that everything is under him. He is the authority in control of the carrying out of what he authorizes to be done." (Senate Committee of Armed Services Hearings on the National Security Act Amendments of 1949 on S. 1269 and S. 1843, p. 2869, 81st Cong., 1st Sess. See also Sen. Rept. 366, 81st Cong., 1st Sess.; H. Rept. 1064, 81st Cong., 1st Sess.; Conf. Rept. 1142, 81st Cong., 1st Sess.)

As head of the Department of the Air Force, the Secretary has exercised authority under the provisions of R. S. 161, 5 U. S. C. 22, the act of March 1, 1875, 10 U. S. C. 16, and as representative of the President in the exercise of his regulatory powers in respect to the Air Force of the United States, to promulgate regulations for the administration of the Department. Pursuant to the above authority, the Secretary has promulgated certain Air Force Regulations and has adopted certain Army Regulations in respect to the preservation, conservation, and release of departmental records:

Army Regulation 410–5, sections III and IV.
Army Regulation 420–5.
Air Force Regulation 62–14,
Air Force Regulation 112–2.
Air Force Regulation 205–1, 32 C. F. R. 805.
Joint Army-Air Force Regulation 1–11–60.
Air Force Regulation 5–9.

34a Army Regulations Nos. 410–5 and 420–5, pertaining to the release of information and reports in connection with litigation, are presently in effect in the Department of the Air Force, and for that reason the Department of the Air Force has not published similar regulations which would supersede the existing Army Regulations.

(S) THOMAS K. FINLETTER,
Secretary of the Air Force.

COUNTY OF ARLINGTON,
State of Virginia, ss:

Subscribed and sworn to before me this eighth day of August 1950.

[SEAL] (S) A. F. SPADA,
Notary Public.

My Commission expires 14 September 1952.

In United States District Court

Affidavit of the Judge Advocate General, United States Air Force

Filed October 10, 1950

Reginald C. Harmon, Major General, USAF, Serial Number 721A, The Judge Advocate General, United States Air Force, who being first duly sworn, deposes and says:

That as The Judge Advocate General, United States Air Force, he is responsible for the furnishing of material and the appearance of witnesses from among the military personnel of the United States Air Force in all matters where the United States Air Force is interested and in particular the above-styled suit.

That the following personnel of the Air Force are the only surviving military witnesses to the aircraft accident that occurred on October 6, 1948, approximately two miles south of Waycross, Georgia, in which aircraft type TB-29 (Serial Number 45-21866) was completely destroyed, and in which plaintiffs' decedents were killed:

"Captain Herbert W. Moore, 1279A, Tyndall Air Force Base, Florida.

35a "Staff Sergeant Walter J. Peny, AF 6980255, Chatham Air Force Base, Florida.

"Technical Sergeant Earl W. Murrhee, AF 14171471, MacDill Air Force Base, Florida."

That the aforementioned three witnesses will be made available at the expense of the United States for interrogation by the plaintiffs at a place and time to be designated by the plaintiffs,

That these witnesses will be authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature,

That these witnesses will be authorized to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force,

That upon demand by the plaintiff all records, other than those which have been classified or determined to be privileged, have already been made available by the Air Force,

That such information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment,

And That the disclosure of statements made by witnesses before Accident Investigation Boards would have a deterrent effect

upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety.

(S) REGINALD C. HARMON,
Major General, USAF.

Subscribed and sworn to before me this seventh day of August 1950.

In United States District Court

Amended order re production and inspection of documents

September 21, 1950

36a A rehearing on plaintiffs' Motion for Production of Documents under Rule 34 was held on August 9, 1950, at the request of defendant, the United States of America. Pursuant to claim of privileged advanced by defendant at said rehearing, the Order for production of documents entered on July 20, 1950, is hereby amended to read as follows:

"Order that defendant, the United States of America, its agents and attorneys, produce for examination by this court the below-listed documents, so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest.

"(a) The report and findings of the official investigation of the crash of defendant's B-29 type aircraft near Waycross, Georgia, on October 6, 1948.

"(b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A.

"(c) The statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025.

"(d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF14171471."

And it is further ordered that the said examination be held at United States Courthouse, Room 2096, in the City of Philadelphia, Commonwealth of Pennsylvania, on the 4th day of October, 1950, at 2 o'clock, P.M.

And it is further ordered that defendant, the United States of America, its agents and attorneys, thereafter permit plaintiffs and their attorneys to inspect the said documents and make copies of the same, with the exception of any part or parts of the said documents which may have been determined by this court to be privileged from discovery.

(S) KIRKPATRICK, *J.*

37a In United States District Court

Order that facts be taken as established

Filed October 12, 1950

Defendant having failed to comply with the order of this court dated September 21, 1950, requiring defendant to produce certain documents at Room 2096, United States Courthouse, Philadelphia, Pennsylvania, on October 4, 1950, for discovery purposes; and it appearing that the said documents are in the possession and control of defendant, that there was no sufficient excuse for defendant's failure to produce the same.

It Is Ordered that the following facts be taken as established for the purposes of this action, that plaintiffs need produce no further proof with respect to said facts, and that defendant will not be permitted to introduce evidence controverting said facts:

1. The deaths of William H. Brauner, Albert Palya and Robert E. Reynolds occurred as the result of the crash near Waycross, Georgia, on October 6, 1948, of a B-29 airplane owned and operated by defendant, United States of America.

2. The said crash and the resulting deaths of the aforesaid persons were caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment.

(S) KIRKPATRICK, *Ch. J.*

OCTOBER 12, 1950.

In United States District Court

Opinion on pleadings and proof

Filed February 20, 1951

Before KIRKPATRICK, Ch. J.

I affirm the plaintiffs' requests for findings of fact Nos. 1, 2, 3, 4, 5, 8, and 9. I also find as follows: The full value of the life of William Brauner as of the date of his death is $80,000. The full value of the life of Albert Palya as of the date of his death is $80,000.

I affirm the plaintiffs' first two requests for conclusions of law. I affirm the third conclusion of law to the extent that the gross sum each decedent would have earned to the end of his life had he not been killed, reduced to present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate each plaintiff for her loss.

38a See the opinion filed this day in the case of Patricia J. Reynolds v. United States of America, Civil Action No. 10142.

In United States District Court

Civil Action No. 10142

Opinion on pleadings and proof

Filed February 20, 1951

Before KIRKPATRICK, Ch. J.

In this case, in which the plaintiff sued under the Federal Tort Claims Act to recover damages for the death of her husband, judgment has been entered for the plaintiff and damages are now to be awarded.

Concededly, the law of Georgia, where the fatal accident occurred, is binding upon the Court in respect of the measure of damages, unless it is in conflict with the Federal Tort Claims Act (28 U. S. C., Sec. 2674). The Georgia statute provides that a widow may recover from one negligently causing the death of her husband "the full value of the life of the decedent, as shown by the evidence" which the statute defines as "the full value of the life of the decedent without deduction where necessary for other personal expenses of the decedent had he lived."

The Federal Tort Claims Act, after making the United States liable in tort claims to the same extent as a private individual under like circumstances, provides that it shall not be liable for punitive damages. The Act then says "If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." The defendant contends that this supersedes the Georgia statute and that, inasmuch as the plaintiff produced no evidence of what it cost the decedent to live and what part of his salary he customarily kept for his personal expenses, the evidence is insufficient to allow the Court to make a finding of the
39a widow's "pecuniary injuries," with the result that the Court cannot make an award of damages in any amount. Unless the Georgia statute provides or has been construed to provide for damages "only" punitive in nature, the defendant's position cannot be sustained.

The defendant bases its argument upon a discussion of the origin and general nature of legislation providing a remedy for

wrongful death, which appears in several opinions of the Supreme Court of Georgia, particularly Savannah Electric Co. v. Bell, 124 Ga. 663, and Pollard v. Kent, 59 Ga. App. 118. These opinions say that the Georgia death statute is "punitive so far as the defendant is concerned," but it is clear that what was meant was that, as in all death statutes, beginning with Lord Campbell's Act, the imposition upon a wrongdoer of civil liability for causing the death of another was to some extent a punitive concept. The Georgia Court makes it quite clear that the damages to be awarded to the plaintiff pursuant to the liability created by the statute, as distinguished from the liability itself, are not punitive damages by any definition. The same opinions declare them to be "compensatory" so far as the plaintiff is concerned.

The fact is that while the theory of the Georgia statute, like that of similar legislation elsewhere, may be described as punitive, the damages which it awards to a widow are entirely compensatory. Admittedly, the widow may, under the statute, recover more than the actual amount of money which she has lost by reason of her husband's death, but the restitution of expected support from her husband rarely compensates a widow fully for his death. It takes no account of the various intangible items of injury such as emotional distress, loss of consortium, companionship, services, advice and guidance. The measure set up by the Georgia statute for "full" value of the life of the decedent, permitting the widow to recover for all these items as well as her actual out-of-pocket loss, may well be intended as an approximation, arbitrary perhaps, but nonetheless legitimate.

That the Federal Tort Claims Act (28 U. S. C. Sec. 2674)
40a was not intended to apply to a statute like that of Georgia becomes quite plain when the legislative history of the Section and the Amendment is considered. At the time of its enactment there were two states, Alabama and Massachusetts, in which the damages were, beyond question "only" punitive. Thus, under the Alabama statute the age and life expectancy of the deceased, his physical and mental condition and earning capacity are all immaterial. Louisville & Nashville R. R. Co. v. Tegner, 125 Ala. 593, 698. In that state as in Massachusetts the recovery for a wrongful death is determined solely by reference to the character of the wrongful act and the degree of the wrongdoer's culpability. The committee report shows that it was this measure of damage which Congress intended to eliminate in death cases under the Tort Claims Act.

There is ample evidence in the case from which the "full value" of the life of this decedent within the meaning of the Georgia statute can be ascertained. In Pollard v. Kent, supra, the Georgia Court said, "* * * 'The actual facts and circumstances of each

case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss.'"

I have examined and considered the calculations submitted by the plaintiff in support of her claim. They are relevant, but even though uncontradicted, are not binding upon the Court. In ascertaining damages in a death case the Court's task is not limited to adding together a number of mathematically ascertained elements. The problem is to find a sum which in the judgment of the Court or jury will fairly and justly compensate the widow for her loss. All the elements made relevant by the controlling law should be taken into consideration, but the final award must come from an exercise of judgment by the trier of fact.

With these principles in mind, I affirm the first five of the plaintiff's requests for findings of fact. I also find as follows: The full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

I affirm the plaintiff's first two requests for conclusions of law.

I affirm the third conclusion of law to the extent that the
41a gross sum the decedent would have earned to the end of his life had he not been killed, reduced to its present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate the plaintiff for her loss.

In United States District Court

Civil Action No. 9793

Decree

Filed February 27, 1951

An order having been entered by Judge Kirkpatrick on October 12, 1950, in the above-entitled action, establishing as a fact that the deaths of William H. Brauner and Albert Palya were caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment;

And the issue of damages in the above-entitled action having been duly tried before Judge Kirkpatrick on November 27, 1950, and both sides having been heard by counsel and an opinion having been filed on February 20, 1951, finding that the full value of the life of William H. Brauner as of the date of his death is $80,000; and finding that the full value of the life of Albert Palya is $80,000.

Now February 27, 1951, on motion of Charles J. Biddle, Esquire, counsel for plaintiffs, it is duly ordered that judgment be entered in favor of the plaintiff Phyllis Brauner and against the defendant, United States of America, in the sum of $80,000, and that judgment be entered in favor of the plaintiff Elizabeth Palya and against the defendant, United States of America, in the sum of $80,000.

(S) KIRKPATRICK, *Ch. J.*

In United States District Court.

Civil Action No. 10142

Decree

Filed February 27, 1951

An order having been entered by Judge Kirkpatrick on October 12, 1950, in the above-entitled action, establishing as a fact that the death of Robert E. Reynolds was caused solely and exclusively by the negligence and wrongful acts and omis-
42a sions of the officers and employees of defendant while acting within the scope of their office and employment;

And the issue of damages in the above-entitled action having been duly tried before Judge Kirkpatrick on November 27, 1950, and both sides having been heard by counsel and an opinion having been filed on February 20, 1951, finding that the full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

Now February 27, 1951, on motion of Charles J. Biddle, Esquire, counsel for plaintiff, it is duly ordered that judgment be entered in favor of the plaintiff, Patricia J. Reynolds, and against the defendant, United States of America, in the sum of $65,000.

(S) KIRKPATRICK, *Ch. J.*

Received & Filed, June 21, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483.

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA

Motion to Consolidate for Briefing and Trial Purposes and Motion for Extension of time in Which to File Appellant's Brief

AND NOW comes Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and respectfully shows the Court as follows:

1. The above case and that of PHYLLIS BRAUNER and ELIZABETH PALYA, No. 10484, were consolidated for trial purposes in the District Court and were tried as one case; and three judgments were entered thereon.

2. Two records on appeal were sent up to the United States Court of Appeals for the Third Circuit, being United States Court of Appeals Nos. 10483 and 10484.

3. The three cases grew out of the same aeroplane accident, and for conservation of time and money should be argued and briefed as one case on appeal.

4. The defendant-appellant, UNITED STATES OF AMERICA, has raised inter alia certain statutory questions herein which revolve around a bar order of the trial court upon the defendant UNITED STATES OF AMERICA's refusal to produce certain documents for inspection upon Plaintiff's Motion for Discovery.

5. The Brief of Appellant in this matter is being prepared in Washington by the joint efforts of the Solicitor General, the Attorney General of the United States, and the Judge Advocate General of the United States Army Air Force.

6. In view of the importance of the questions involved in this appeal; the approaching Summer Season; and the vacation and manpower problems, it is respectfully requested that the time for filing Appellant's Brief in the above entitled case be extended to August 27, 1951; inasmuch as counsel for the appellee has refused

to sign a stipulation extending the time, and has been notified of this Motion and served with a copy thereof.

GERALD A. GLEESON,
United States Attorney.

THOMAS J. CURTIN,
Assistant United States Attorney
Attorneys for Appellant.

Received & Filed, June 21, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA

Motion to Consolidate for Briefing and Trial Purposes and Motion for Extension of time in Which to File Appellant's Brief

AND NOW comes Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and respectfully shows the Court as follows:

1. The above case and that of PATRICIA J. REYNOLDS, No. 10483, were consolidated for trial purposes in the District Court and were tried as one case; and three judgments were entered thereon.

2. Two records on appeal were sent up to the United States Court of Appeals for the Third Circuit, being United States Court of Appeals Nos. 10483 and 10484.

3. The three cases grew out of the same aeroplane accident, and for conservation of time and money should be argued and briefed as one case on appeal.

4. The defendant-appellant, UNITED STATES OF AMERICA, has raised inter alia certain statutory questions herein which revolve around a bar order of the trial court upon the defendant UNITED STATES OF AMERICA's refusal to produce certain documents for inspection upon Plaintiff's Motion for Discovery.

5. The Brief of Appellant in this matter is being prepared in Washington by the joint efforts of the Solicitor General, the Attorney General of the United States, and the Judge Advocate General of the United States Army Air Force.

6. In view of the importance of the questions involved in this appeal; the approaching Summer Season; and the vacation and manpower problems, it is respectfully requested that the time for filing Appellant's Brief in the above entitled case be extended to August 27, 1951; inasmuch as counsel for the appellee has refused

to sign a stipulation extending the time, and has been notified of this Motion and served with a copy thereof.

GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.

THOMAS J. CURTIN,
Thomas J. Curtin,
Assistant United States Attorney
Attorneys for Appellant.

Received & Filed, June 22, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA

Answer to Motion for Extension of Time in Which to File Appellant's Brief

AND NOW, June 22, 1951, come CHARLES J. BIDDLE, Esquire and FRANCIS HOPKINSON, Esquire, attorneys for Appellee in the above cause, and make Answer to the Petition filed on behalf of Appellant, UNITED STATES OF AMERICA, as follows:

1. Admitted.

2. Admitted, except that the number of this appeal is 10,483 and not 10,484 as stated.

3. Admitted.

4. Admitted.

5 and 6. Appellee has no knowledge as to the facts averred in paragraph 5, but submits that the same are immaterial. The Bar Order of the Trial Court upon the Appellant, for its refusal to produce certain documents for inspection upon Appellee's Motion for Discovery (referred to in paragraph 4 of the Petition), which is the basis of this appeal, was entered October 12, 1950, so that the Appellant has already had eight months within which to prepare its brief upon questions appealed from. The final judgment pursuant to the trial in the Court below was entered approximately four months ago, on February 27, 1951.

This case involved a claim for damages for the death of the appellee's husband on October 6, 1948, after which date Appellee was left without means of support other than the small amount received under the Workmen's Compensation Law. It is therefore of great importance to Appellee that this Appeal be promptly heard. If the time for filing Appellant's brief should be extended to August 27, 1951 as requested in its Petition, counsel for Appellee would be required under the rules of your Honorable Court to file their brief within twenty days thereafter, which is exactly the period during which both counsel for Appellee have made all arrangements to be absent on their respective vacations. It would

therefore be necessary for counsel for Appellee to request additional time within which to file their brief on behalf of the Appellee. The result would be that the disposition of this Appeal would be substantially delayed.

It is respectfully suggested that if counsel for Appellant should be directed to file their brief not later than July 16, 1951, counsel for the Appellee would then have an opportunity to prepare their brief within the period allowed by the rules of Court, and the Appeal could then be heard without delay at the Fall Term of your Honorable Court.

WHEREFORE, it is respectfully requested that the time for filing Appellant's brief be fixed at not later than July 16, 1951.

CHAS. J. BIDDLE,
Charles J. Biddle,

FRANCIS HOPKINSON,
Francis Hopkinson,
Attorneys for Appellee.

June 22, 1951.

Received & Filed, June 22, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA

Answer to Motion for Extension of Time in Which to File Appellant's Brief

Date: June 22, 1951.

AND NOW, June 22, 1951, come CHARLES J. BIDDLE, Esq. and FRANCIS HOPKINSON, Esq., attorneys for the Appellees in the above cause and make answer to the Petition filed on behalf of the Appellant, UNITED STATES OF AMERICA, as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.

5 and 6. Appellees have no knowledge as to the facts averred in paragraph 5, but submit that the same are immaterial. The Bar Order of the Trial Court upon the Appellant, for its refusal to produce certain documents for inspection upon Appellee's Motion for Discovery (referred to in paragraph 4 of the Petition), which is the basis of this appeal, was entered October 12, 1950, so that the Appellant has already had eight months within which to prepare its brief upon questions appealed from. The final judgment pursuant to the trial in the Court below was entered approximately four months ago, on February 27, 1951.

This case involved a claim for damages for the death of the Appellees' husbands on October 6, 1948, after which date Appellees and their minor children were left without means of support other than the small amount received under the Workmen's Compensation Law. It is therefore of great importance to Appellees that this Appeal be promptly heard. If the time for filing Appellants' brief should be extended to August 27, 1951 as requested in its Petition, counsel for Appellees would be required under the rules of your Honorable Court to file their brief within twenty days thereafter, which is exactly the period during which both counsel

for Appellees have made all arrangements to be absent on their respective vacations. It would therefore be necessary for counsel for Appellees to request additional time within which to file their brief on behalf of the Appellees. The result would be that the Appeal would be substantially delayed.

It is respectfully suggested that if counsel for Appellant should be directed to file their brief not later than July 16, 1951, counsel for the Appellees would then have an opportunity to prepare and file their brief within the period allowed by the rules of court and that the Appeal could then be heard without delay at the Fall Term of your Honorable Court.

WHEREFORE, it is respectfully requested that the time for filing Appellants' brief be fixed at not later than July 16, 1951.

CHAS. J. BIDDLE,
/s/ FRANCIS HOPKINSON,
Attorneys for Appellees.

Date: June 22, 1951.

Received & Filed, June 29, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA, *Appellant*

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA, *Appellant*

Order

Upon consideration of the motion of the appellant in the above entitled cases and of the answer in opposition thereto: It is ORDERED that:

1. The appeals be and they hereby are consolidated for briefing and oral argument
2. The time for filing the appellant's brief be and it hereby is extended to August 27, 1951
3. The time for filing the appellees' brief be and it hereby is extended to October 8, 1951
4. The above entitled cases be listed for oral argument during the week commencing October 15, 1951.

BIGGS,
Chief Judge.

June 29, 1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA, *Appellant*

No. 10,484

PHYLLIS BRAUNER AND ELIZABETH PALYA

v.

UNITED STATES OF AMERICA, *Appellant*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 19, 1951
Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

Opinion of The Court

(Filed December 11, 1951)

By MARIS, *Circuit Judge.*

On October 6, 1948, a United States Air Force B-29 bomber, enroute from Robbins Air Force Base on a flight to Orlando, Florida, and return, crashed at Waycross, Georgia. The plane, carrying nine crew members and four civilian observers, had taken off for the purpose of an experimental testing of secret electronics equipment. Of the thirteen persons on board, nine were killed, including six members of the crew and three civilian observers who were engineer employees of private organizations involved in the research and development of the electronics equipment being tested. These consolidated suits under the Federal Tort Claims Act were thereafter instituted in the United States District Court

for the Eastern District of Pennsylvania by the widows of the three deceased civilian employees, each seeking damages for the alleged wrongful deaths of the deceased.

3 Subsequent to the filing of answers making general denials, detailed interrogatories pursuant to Civil Procedure Rule 33 were served on the United States Attorney by the plaintiffs. One of the interrogatories requested that a copy of any investigation report of the accident be attached to the answer. Another similarly sought copies of statements of witnesses which might have been obtained in connection with the accident. In answering the interrogatories the United States declined to comply with those questions which required the production of documents on the ground that such production was not within the scope of Rule 33.

Following the filing of these answers, plaintiffs made a motion under Civil Procedure Rule 34 for production of the official investigation report prepared by officers of the Air Force and the statements of the surviving crew members taken in connection with that investigation. To show good cause the motion and supporting affidavits stated that those documents constituted or contained information and evidence necessary in preparation for trial, that the documents were in the possession and control of the United States and that plaintiffs knew no way to obtain knowledge of their contents or the cause of the accident other than by their production.

On June 30, 1950 the district court sustained plaintiffs' motions to produce, holding that good cause had been shown therefor. 10 F.R.D. 468. After deciding the matter of good cause, the district judge disposed of the question as to the privileged status of the departmental records involved by reference to the views which he had expressed in O'Neill v. United States, 1948, 79 F. Supp. 827. An order requiring production was entered on July 20, 1950.

The Attorney General, upon being notified of the result reached by the district judge, notified the Department of the Air Force. On July 24, 1950 a letter from the Secretary of the Air Force to the district court stated:

> "Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations,

this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.

"It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court."

Thereafter the district judge suggested that a hearing might be held so that this aspect of the case might be further considered. Accordingly a hearing was held by agreement in Washington, D.C., on August 9, 1950. At this hearing the district judge received a formal "claim of privilege" by the Secretary of the Air Force, setting forth the basis for the claim and the authority for the privilege, supported by his affidavit showing his right to promulgate regulations under Sec. 161, R.S., and the Act of March 1, 1875, 10 U.S.C. § 16, as head of the Department of the Air Force and describing the applicable regulations. In addition, an affidavit by the Judge Advocate General of the Air Force was filed which set forth the names and addresses of the survivors, undertook to make these witnesses available for interrogation at plaintiffs' will and at Government expense, and guaranteed to authorize the witnesses to testify to all matters pertaining to the cause of the accident except as to "classified" material. Further, the affidavit of the Judge Advocate General, after averring that all records, other than those classified or privileged, had already been made available to plaintiffs, specifically stated that the investigation board report and survivors' statements could not be furnished without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment.

An amended order was issued by the district judge on September 21, 1950, to the effect that the United States should produce for examination by the court the documents in question, so that the court could determine whether the disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest." Compliance with this order was not forthcoming and, on October 12, 1950, the district judge issued an order, under Civil Procedure Rule 37, that the facts in plaintiffs' favor on the issue of negligence be taken as established and prohibiting the defendant from introducing evidence to controvert those facts. Subsequently, a hearing was held on the question of damages and judgment was entered for the plaintiffs on February 27, 1951. These appeals by the United States followed.

The appeals now before us raise a number of important and difficult questions for our determination. The first is whether the district judge erred in his ruling that the plaintiffs had shown

good cause under Rule 34 for the production of the statements of witnesses and investigation report which they sought to have produced for their inspection and copying. In concluding that good cause had been shown, the district judge said (10 F.R.D. 468, 470-471):

"The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

"I am not suggesting that the witnesses on deposition would not answer the questions asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise firsthand information as to every relevant fact, if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

"The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the interrogatory 'Describe in detail the trouble experienced', the answer is, 'At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine'. Obviously, the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

"Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun."

We cannot say that in reaching his conclusion that good cause had been shown the district judge erred. The question, as we suggested in Alltmont v. United States, 1950, 177 F. 2d 971, 978, in every such case is whether special circumstances make it essential to the preparation of the party's case to see and copy the documents sought. In appraising for this purpose the circumstances of a particular case, the district court is necessarily vested with a wide discretion. Where, as here, the instrumentality involved in an accident was within the exclusive possession and control of the defendant so that it was as a practical matter virtually impossible for the plaintiffs to have made any independent investigation of the cause of the accident, considerations of justice may well demand that the plaintiffs should have had access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery. We agree with the district judge that it is not, under the circumstances of these cases, a sufficient answer to say that since the names of the witnesses whose statements were sought had been supplied in answer to the interrogatories, their depositions might have been taken by the plaintiffs. Obviously, this is no answer at all to their demand for the production of the investigation report. And under the circumstances here disclosed, as the district judge has cogently pointed out, it may well have been of vital importance to the plaintiffs to have knowledge of the contents of the statements made by the survivors immediately after the crash even though their depositions could also have been taken.

The Government's next contention is that even if it is held that good cause was shown by the plaintiffs for the production of the statements and report in question it was error to require their production because they were privileged. The Government points out that Rule 34 only authorizes the court to order the production of documents which are, in the language of the rule, "not privileged."

The Government's claim of privilege is based primarily on Section 161 of the Revised Statutes.[1] The primary contention is that this section in giving to the Secretary of the Air Force authority to prescribe regulations for the custody and use of the records and papers of his Department necessarily confers upon him full discretionary power in the public interest to refuse to produce any such records for examination and use in a judicial proceeding and that such records thereby become "privileged". The doctrine of separation of powers of the executive and judicial departments of the Government which is embodied in the Constitution is said to place the exercise of this discretionary power by the Secretary wholly beyond judicial review. In passing upon the validity, as applied to these cases, of this contention by the Government that it cannot be compelled to produce any records of the Department of the Air Force which the Secretary of that Department deems it not to be in the public interest to produce, it is necessary to consider the precise setting in which the contention is made.

In the first place it is clear that the validity of the regulations promulgated by the Secretary of the Air Force and his predecessor, the Secretary of War, with respect to the custody and production of papers and records of the Department is not in issue. For these regulations specifically provide that responsibility for the release of reports of boards of officers, special accident reports, or extracts therefrom regarding aircraft accidents to persons outside the authorized chain of command or administration, rests solely with the Secretary of the Air Force.[2] And since here the order to produce was directed to the United States as defendant, its execution, if lawfully demandable, obviously became the duty of the Secretary of the Air Force, the head of that department of the Government of the United States having custody of the records in question, who has full authority under the statute and the regulations to make such production. It is for this reason that the cases of Boske v. Comingore, 1900, 177 U.S. 459, and Touhy v. Ragen, 1951, 340 U.S. 462, both of which involved the refusal of a subordinate employee of a governmental department to produce records without the approval of his department head, are not in point.

Also it will be observed that we are not called upon to decide whether the Government's contention is available as a defense against the enforcement of the desired discovery through a subpoena duces tecum directed to the Secretary or a contempt proceeding against him for failure to obey it. Such a case would in-

[1] "Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it." 5 U.S.C.A. § 22.

[2] AF Regulation, No. 62-7, December 17, 1947, paragraph 6.

deed, as the Government argues, raise difficult constitutional questions arising out of the separation of powers under our Constitution.[3] Here no such action against any officer of the executive branch of the Government has been asked for or taken. We are concerned in these cases merely with ascertaining the legal duty of the Secretary under the Federal Tort Claims Act to make the requested discovery in order that we may determine whether his refusal to do so justified the order made by the district court under Civil Procedure Rule 37(b)(2) that the negligence of the United States be taken as established. And, finally, we do not have to determine the validity of the Government's contention as applied to a demand for the production of documents in a suit between private parties.[4] For here the United States is the party defendant against which these suits have been brought pursuant to the express authority of the Federal Tort Claims Act.

The Federal Tort Claims Act provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."[5] Thus by the express terms of the Act Congress has divested the United States of its normal sovereign immunity to the extent of making it liable in actions such as those now before us in the same manner as if it were a private individual. Moreover it has made the Federal Rules of Civil Procedure, including their discovery provisions, applicable to such actions against the United States.[6] We think that by so doing Congress has withdrawn the right of the executive departments of the Government in tort claims cases, even if under other circumstances such right exists,[7] to determine without judicial review the extent of the privilege against disclosure of Government documents sought to be produced for use in the litigation.

We come then to consider the propriety of the Government's claim of privilege in these cases. The principal basis of the Government's claim of immunity was set forth in the letter of the Secretary of the Air Force to the district judge dated July 24, 1950, from which we have already quoted. In that letter the Secretary stated that he had determined that it would not be in the public interest to furnish the documents requested. The basis which he stated for this determination was that it is necessary to restrict the use of aircraft accident reports so as to insure the collection of

[3] Compare Thompson v. German Valley R. Co., 1871, 22 N.J.Eq. 111; Appeal of Hartranft, 1877, 85 Pa. 433.

[4] Compare Marbury v. Madison, 1803, 5 U.S. 137, 144; Gray v. Pentland, 1815, 2 S. & R. (Pa.) 23.

[5] 28 U.S.C. § 2674.

[6] United States v. Yellow Cab Co., 1951, 340 U.S. 543, 553; United States v. General Motors Corporation, D.C.N.D.Ill. 1942, 2 F.R.D. 528, 530.

[7] But see 8 Wigmore on Evidence, 3d Ed. § 2379; Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451.

all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety in the Air Force. The position of the Secretary in this regard is restated in the formal claim of privilege filed on August 9, 1950, as follows:

> "With regard to the demand for the production of the Report of Investigation (Report of Major Aircraft Accident, AF Form 14) and any other ancillary report or statement pertaining to this investigation, the respondent-defendant, the United States, has objected and still objects to the production of this report on the ground that it is privileged. The report of investigation (Report of Major Aircraft Accident, AF Form 14), together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety. These statements are obtained in confidence, and these reports are prepared for intra-departmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate such accidents. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety."

It will be seen that the privilege thus claimed is a broad one against any disclosure of the results of what the Government has aptly called its "housekeeping" investigations.[8] In support of its claim of privilege the Government points to paragraph 2 of Air Force Regulation No. 62-7 which contains the following provision:

> "Aircraft accident information is procured from reports of personnel who have waived their rights under the 24th Article of War in the interest of accident prevention upon the assurance that the reports will not be used in any manner in connection with any investigation or proceeding toward disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification."

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[8] Bank Line v. United States, D.C.S.D.N.Y. 1948, 76 F. Supp. 801, 803.

It seems clear to us, however, that this regulation has no bearing on the problem before us since it merely imposes restrictions upon the subsequent use within the Department for disciplinary and other purposes of statements of Air Force personnel with respect to aircraft accidents.

It may be conceded that in addition to the privilege against divulging state secrets, to which we shall later advert, there is also a less clearly defined privilege against disclosing official information if such disclosure will actually be harmful to the interests of the nation.[9] But we do not think that in the present cases brought under the Federal Tort Claims Act the Department of the Air Force is entitled to the absolute "housekeeping" privilege which it asserts against disclosing any statements of reports relating to this airplane accident regardless of their contents.[10] It may well be more convenient and efficient in the conduct of accident investigations for the Department not to be required to disclose statements and reports of this character. But the same would be true in the case of any private person and the latter do not ordinarily enjoy that privilege. Where, as here, the United States has consented to be sued as a private person, whatever public interest there may be in avoiding any disclosure of accident reports in order to promote accident prevention must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States.[11] When Congress has desired to bar the admission of airplane accident reports in evidence it has known how to do so[12] and it has also known how to give to department heads discretionary power to refuse to produce records in suits brought against the

[9] As we shall point out later in this opinion this privilege was fully protected by the district judge in his amended order in these cases.

[10] See 8 Wigmore on Evidence, 3d Ed., § 2378a; Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451.

[11] Bank Line v. United States, D.C.S.D.N.Y. 1948, 76 F. Supp. 801; Cresmer v. United States, D.C.E.D.N.Y. 1949, 9 F.R.D. 203.

[12] Title VII of the Civil Aeronautics Act of 1938 contained the following provisions:

"Air Safety Board

. . .

"Sec. 701. . . .

"Preservation of Records and Reports

"(e) The records and reports of the Board shall be preserved in the custody of the secretary of the Authority in the same manner and subject to the same provisions respecting publication as the records and reports of the Authority, except that any publication thereof shall be styled 'Air Safety Board of the Civil Aeronautics Authority', and that no part of any report or reports of the Board or the Authority relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." 52 Stat. 1013.

United States.[13] It has done neither in connection with suits under the Federal Tort Claims Act.

Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were accepted the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.

We need to recall in this connection the words of Edward Livingston: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured."[14] And it was Patrick Henry who said that "to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country."[15]

It has been held that in criminal cases the Government has the choice either to reveal all evidence within its control which bears upon the charges or let the offense go unpunished, at least where the evidence is held by officials who are themselves charged with the administration of those laws for the violation of which the accused has been indicted.[16] We think that the Federal Tort Claims Act offers the Government an analogous choice in tort claims cases. The Government may decide to recognize the public interest involved in according justice to the private claimant who has brought suit against it by producing relevant documents in its possession upon an order of the court under Rule 34. On the other hand the Government may decide to give priority to the public interest which it

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13 For example, § 2507 of Title 28, United States Code, provides:

"§ 2507. Calls on departments for information.

"The Court of Claims may call upon any department or agency of the United States for any information or papers it deems necessary, and may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

"The head of any department or agency may refuse to comply when, in his opinion, compliance will be injurious to the public interest."

14 Edward Livingston, Works, I, p. 15.

15 Elliot's Debates, vol. 3, p. 170.

16 United States v. Andolschek, 2 Cir. 1944, 142 F. 2d 503; United States v. Krulewitch, 2 Cir. 1944, 145 F. 2d 76; United States v. Beekman, 2 Cir. 1946, 155 F. 2d 580, 584; United States v. Grayson, 2 Cir. 1948, 166 F. 2d 863.

believes to be involved in preserving the documents from disclosure by declining to produce them upon the order of the court at the cost, if its claim of privilege is overruled, of having the facts to which the documents are directed taken by the court to be established against the United States under Civil Procedure Rule 37(b)(2)(i). This last is the alternative which the Government chose in the cases now before us. The Federal Rules of Civil Procedure offer such a choice to private litigants under similar circumstances and we are satisfied that under the Federal Tort Claims Act the same choice is presented to the Government which, as we have seen, has been placed by Congress in this respect in the position of a private individual defending against a tort action.

At this point we must pause to notice a procedural contention of the Attorney General. It is that since the question which we have been discussing involves the duty of the Secretary of the Air Force to produce the documents in question it may only be decided in a proceeding in which that official is brought into court by direct process to answer the plaintiffs' demands for production of the documents. We find no merit in this contention, however, since the order to produce the documents which was made by the district court in these cases was not directed to the Attorney General or any other officer of the Government. On the contrary, it was directed to "defendant, the United States of America, its agents and attorneys." Since obviously the United States can respond only by its agents and since the Secretary of the Air Force is the agent of the United States concerned with the documents here ordered to be produced it seems quite clear that the order is directed to and binding upon him just as much as upon the Attorney General who in these cases is merely attorney for the United States. Moreover we think that the Secretary of the Air Force recognized this fact when he presented his claim of privilege to the district court for its consideration and approval stating that the defendant, the United States, objected to production on the ground that the documents were privileged. Under these circumstances it was clearly within the judicial power of the court to pass upon the question of privilege thus raised.

The formal claim of privilege filed with the district court by the Secretary of the Air Force on August 9, 1950, laid a second basis for the claim in the following language:

> "The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information con-

cerning its operation or performance would be prejudicial to this Department and would not be in the public interest."

The claim of privilege thus made is of a wholly different character from the one previously discussed. It asserts in effect that the documents sought to be produced contain state secrets of a military character. State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding[17] and unquestionably come within the class of privileged matters referred to in Rule 34. Moreover this privilege, as well as the privilege previously mentioned against disclosure of official information which would be harmful to the interests of the United States, was fully recognized by the district judge in these cases in his final order. For as we have seen, he directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the documents contain, to use the words of his order, "matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest." The Government was thus adequately protected by the district court from the disclosure of any privileged matter contained in the documents in question.

The Government contends, as we have stated, that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition. On the contrary we are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts,[18] which is to be determined in accordance with the appropriate rules of evidence,[19] upon the submission of the documents in question to the judge for his examination *in camera*.[20] Such examination must

[17] Totten v. United States, 1875, 92 U.S. 105, 107; Firth Sterling Steel Co. v. Bethlehem Steel Co., D.C.E.D.Pa. 1912, 199 F. 353; Pollen v. Ford Instrument Co., D.C.E.D.N.Y. 1939, 26 F. Supp. 583; 8 Wigmore on Evidence, 3d Ed., §§ 2212a, 2378; 1 Greenleaf on Evidence, Lewis's Ed., § 250.

[18] Cresmer v. United States, D.C.E.D.N.Y. 1949, 9 F.R.D. 203; Evans v. United States, D.C.W.D.La. 1950, 10 F.R.D. 255.

[19] Aaron Burr's Trial, Robertson's Rep. (1808), vol. 1, pp. 180-181; United States v. Ebeling, 2 Cir. 1944, 146 F.2d 254, 256-257; Wild v. Payson, D.C.S.D.N.Y. 1946, 7 F.R.D. 495, 499; 2 Moore's Federal Practice (1938) 2641.

[20] "It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence?" 8 Wigmore on Evidence, 3d Ed., p. 799.

See also 4 Moore's Federal Practice, 2d Ed., p. 1178.

obviously be *ex parte* and *in camera* if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.[21]

The Government presses upon us the contrary conclusion of the British House of Lords in Duncan v. Cammell, Laird & Co., (1942) A.C. 624. The case is distinguishable in that the plans of the submarine "Thetis" there involved were obviously military secrets and the suit was between private parties. But we do not regard the case as controlling in any event. For whatever may be true in Great Britain[22] the Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision.[23] Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.[24] And if, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*.

One final point remains to be considered. The Government points to Civil Procedure Rule 55 (e) which provides that "No judgment by default shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by

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[21] United States v. Cotton Valley Operators Committee, D.C.W.D.La. 1949, 9 F.R.D. 719, 720, affirmed by equally divided court, 339 U.S. 940; 8 Wigmore on Evidence, 3d Ed., § 2379.

[22] Compare Duncan v. Cammell, Laird & Co., (1942) A.C. 624, with Robinson v. State of South Australia (No. 2), (1931) A.C. 704.
See Note, Administrative Discretion and Civil Liberties in England, 1943, 56 Harv. L. R. 806.

[23] Kilbourn v. Thompson, 1880, 103 U.S. 168, 182, 190; C. & S. Air Lines v. Waterman Corp., 1948, 333 U.S. 103, 113.

[24] See Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451, 1462-1464.

evidence satisfactory to the court." Its contention is that the order of the district court entered in these cases that the facts in plaintiffs' favor on the issue of negligence be taken as established because of the Government's refusal to produce the documents in question amounted to the entry of judgment against the United States by default in violation of the rule. We do not agree. Paragraph (a) of Rule 55 in effect defines judgment by default as the judgment which the clerk enters when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the rules. In the case before us the United States has filed answers and has vigorously defended the actions. The distinction is outlined in Rule 37(b)(2). That rule sets forth the relief which the court may grant upon the refusal of a party to produce evidence after having been directed to do so, as follows:

> "(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> "(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;
>
> "(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

It will be observed that the order made by the court in these cases is of the type authorized by subparagraphs (i) and (ii), whereas a judgment by default against a disobedient party is specifically authorized by subparagraph (iii). We think it is clear from the language of the rules that the order made by the district court in these cases did not amount to a judgment by default within the meaning of Rule 55 (e).

We conclude (1) that the district court did not err in holding that good cause had been shown by the plaintiffs for production of the statements and the report in question which they asked the United States to produce, (2) that the district court rightly rejected the broad claim of privilege made by the United States not to produce any statements or reports regarding airplane accidents, (3) that the order of the district court entered on rehearing on plaintiffs' motions for the production of the documents rightly

provided for the determination by the court of the Government's claim of privilege as to any particular parts of the documents and (4) that upon the election of the United States nonetheless not to produce the documents, the order of the court directing that certain facts be taken as established against the United States in these cases was authorized by Rule 37 (b)(2)(i) and (ii) and was accordingly not erroneous.

Since we find no error the judgments entered in favor of the plaintiffs after trial of the issue of damages will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Received and Filed, Dec. 11, 1951, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

vs.

UNITED STATES OF AMERICA, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and KALODNER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 11, 1951

Received and Filed, Dec. 11, 1951, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

vs.

UNITED STATES OF AMERICA, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and KALODNER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 11, 1951

Received & Filed Jan. 15, 1952. Ida O. Creskoff, Clerk.

Civil Action No. 10142

No. 10,483

PATRICIA J. REYNOLDS

vs.

UNITED STATES OF AMERICA, *Appellant*

Mandate

UNITED STATES OF AMERICA, ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Patricia J. Reynolds, Plaintiff, (Appellee) and United States of America, Defendant, (Appellant)—Civil Action No. 10142—a judgment was entered in the District Court on February 27, 1951, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiff after trial of the issue of damages be, and the same is hereby affirmed.

December 11, 1951

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws

of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 15th day of January in the year of our Lord one thousand nine hundred and fifty-two.

IDA O. CRESKOFF,
Clerk, United States Court of
Appeals for the Third Circuit

Received & Filed Jan. 15, 1952. Ida O. Creskoff, Clerk.

Civil Action No. 9793

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

vs.

UNITED STATES OF AMERICA, *Appellant*

Mandate

UNITED STATES OF AMERICA, ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Phyllis Brauner and Elizabeth Palya, Plaintiffs, (Appellees) and United States of America, Defendant, (Appellant) —Civil Action No. 9793—a judgment was entered in the District Court on February 27, 1951, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.
December 11, 1951

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws

of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 15th day of January in the year of our Lord one thousand nine hundred and fifty-two.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit

Clerk's Certificate

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant in the cases of Patricia J. Reynolds vs. United States of America, appellant, No. 10,483, and Phyllis Brauner and Elizabeth Palya vs. United States of America, appellant, No. 10,484, on file and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 2d day of February in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States the one hundred and seventy-sixth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals,
Third Circuit.

SEAL

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75a Supreme Court of the United States

No. 638, October Term, 1951

THE UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

Order allowing certiorari

Filed April 7, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.